IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs October 30, 2007

STATE OF TENNESSEE v. JODY GLEN LOY

Appeal from the Criminal Court for Knox County
No. 79955 Mary Beth Leibowitz, Judge

No. E2006-02206-CCA-R3-CD - Filed May 30, 2008

The Appellant, Jody Glen Loy, appeals his conviction by a Knox County jury of DUI, third offense. On appeal, Loy raises four issues for our review: (1) whether the evidence is sufficient to support the conviction; (2) whether the trial court erred in overruling Loy's motion to suppress because no reasonable suspicion existed to initiate a stop of his vehicle; (3) whether a prior DUI conviction was facially invalid and, thus, improperly used to enhance the imposed sentence; and (4) whether the court erred in allowing the State to amend the indictment over Loy's objection after jeopardy attached. Following review of the record, we find no error and affirm the conviction.

Tenn. R. App. P. 3; Judgment of the Criminal Court Affirmed

DAVID G. HAYES, J., delivered the opinion of the court, in which DAVID H. WELLES and D. KELLY THOMAS, JR., JJ, joined.

Mark E. Stephens, District Public Defender; and Gianna Maio, Assistant Public Defender, Knoxville, Tennessee, for the Appellant, Jody Glen Loy.

Robert E. Cooper, Jr., Attorney General and Reporter; Leslie E. Price, Assistant Attorney General; Randall E. Nichols, District Attorney General; and Leland Price, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

Factual Background

Around 2:00 a.m. on May 9, 2002, Lieutenant Jeffrey Severs of the University of Tennessee Police Department observed a blue Ford Taurus traveling east on Cumberland Avenue weaving within its own lane. Severs followed the vehicle and, a short distance later, observed the vehicle cross the center line on three occasions, at which point he initiated a traffic stop to determine if there was "anything going on that was going to create some safety problems." Severs activated his blue lights, and the Appellant pulled the vehicle into a parking lot.

After making contact with the Appellant, Severs noticed that the Appellant had slurred speech, bloodshot eyes, and an odor of alcohol about him. Following Severs' request for the Appellant's driver's license, the Appellant "fumbled it a little bit trying to get to it," his motor skills appeared to be impaired, and it took an excessive amount of time to comply with the request. Based upon these observations, Severs asked the Appellant to exit the vehicle to perform two standard field sobriety tests. According to Severs, he instructed the Appellant to move to a reasonably level location in the parking lot to perform the tests, which were performed poorly by the Appellant. The Appellant was unable to keep his balance and, in fact, was unable to complete the "one-leg stand" test. A second officer, Lieutenant Gerald Johnson, arrived on the scene to assist and to videotape the Appellant performing the tests. However, due to a camera malfunction, only one test was visible on the tape. Johnson testified, however, that the Appellant performed poorly on both tests and that, in his opinion, the Appellant was "definitely intoxicated."

Based upon the Appellant's poor performance of the sobriety tests and the officers' observations, the Appellant was arrested for DUI and transported to the police station. A search of the Appellant's vehicle revealed four empty Corona beer bottles. At the police station, the Appellant was asked to submit to a chemical or breath test to determine his level of intoxication. He refused, despite being informed of the consequences of a violation of the implied consent law, and stated that it would not be in his best interest to take the test because he had consumed four beers.

In June 2004, a Knox County grand jury returned a two-count indictment charging the Appellant, in Count 1, with DUI, and, in Count 2, enhanced punishment based upon notice of three prior DUI convictions. On July 20, 2005, the Appellant filed a motion to suppress all evidence obtained from his arrest, asserting that no probable cause or reasonable suspicion existed for the initial stop. In October, the Appellant filed a motion to exclude or strike two of the prior convictions utilized to enhance the Appellant's sentence to that of DUI, fourth offense, based upon grounds that the two convictions were facially invalid. Both motions were denied by the trial court.

The Appellant subsequently filed a motion to reconsider the denial of his motion to exclude or strike the prior convictions. On the morning of the scheduled trial, the trial court granted the Appellant's motion to strike one of the prior convictions being used to enhance the Appellant's sentence, that being a prior Anderson County DUI conviction. Accordingly, the State proceeded to trial for prosecution of DUI, third offense, a misdemeanor, as opposed to DUI, fourth offense, a felony.

Following the presentation of evidence during the bifurcated proceeding, the Appellant was convicted of DUI and DUI, third offense, which were merged. The Appellant was subsequently sentenced to a term of eleven months and twenty-nine days, all of which was suspended except for one hundred and twenty days, which was ordered to be served in confinement. Following the denial of his motion for new trial, the Appellant filed the instant timely appeal.

Analysis

On appeal, the Appellant has raised four issues for our review: (1) whether the evidence is sufficient to support his conviction for DUI, third offense; (2) whether the trial court erred in overruling the Appellant's motion to suppress evidence obtained as a result of an illegal stop; (3) whether the court erred in refusing to strike a prior conviction listed in Count 2 of the indictment which was used to enhance the DUI sentence; and (4) whether the trial court erred in allowing the State to amend the indictment after jeopardy had attached.

I. Sufficiency of the Evidence

First, the Appellant contends that the evidence presented was insufficient to support his conviction for DUI, third offense. The Appellant's argument in support of this contention is as follows:

> In addition to the lack of evidence to support reasonable suspicion, the proof at trial was that [the Appellant] had no difficulty exiting his vehicle, and was able to understand and respond to officer instruction. He produced his driver's license upon request, and was polite. He had an orderly appearance. Lt. Severs did not note at the time of arrest that [the Appellant] had red, bloodshot eyes, but added that observation during trial. Lt. Severs felt [the Appellant] was coherent enough to sign a waiver of liability, allowing them to leave his car at the scene. They returned his car keys to him at the police station. Both field sobriety tests were performed on a significant grade, . . . thereby affecting the results.

In considering this issue, we apply the rule that where the sufficiency of the evidence is challenged, the relevant question for the reviewing court is "whether, after viewing the evidence in the light most favorable to the [State], *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979); *see also* Tenn. R. App. P. 13(e). Moreover, the State is entitled to the strongest legitimate view of the evidence and all reasonable inferences which may be drawn therefrom. *State v. Harris*, 839 S.W.2d 54, 75 (Tenn. 1992). All questions involving the credibility of witnesses, the weight and value to be given the evidence, and all factual issues are resolved by the trier of fact. *State v. Pappas*, 754 S.W.2d 620, 623 (Tenn. Crim. App. 1987). This court will not reweigh or reevaluate the evidence presented. *State v. Cabbage*, 571 S.W.2d 832, 835 (Tenn. 1978).

"A guilty verdict by the jury, approved by the trial judge, accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the theory of the State." *State v. Grace*, 493 S.W.2d 474, 476 (Tenn. 1973). A jury conviction removes the presumption of innocence with which a defendant is initially cloaked and replaces it with one of guilt, so that on appeal, a convicted defendant has the burden of demonstrating that the evidence is insufficient. *State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn. 1982). These rules are applicable to findings of guilt predicated upon direct evidence, circumstantial evidence, or a combination of both. *State v. Matthews*, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990).

Tennessee Code Annotated section 55-10-401(a)(1) (2006), provides that "[i]t is unlawful for any person to drive or to be in physical control of any automobile . . . on any of the public roads and highways of the state . . . while . . . [u]nder the influence of any intoxicant[.]" Pursuant to Tennessee Code Annotated section 55-10-403 (2006), the conviction and punishment are enhanced if a defendant has prior DUI convictions.

Review of the evidence, in the light most favorable to the State, reveals that a rational trier of fact could clearly have found the essential elements of the offense of DUI beyond a reasonable doubt. The evidence established that Lt. Severs witnessed the Appellant driving his Ford Taurus on Cumberland Avenue at approximately 2:00 a.m. Initially, Severs noticed the Appellant's vehicle weaving within its own lane of traffic but eventually saw the car cross the center line three times. After activating his blue lights to initiate a traffic stop, the Appellant pulled his car into a parking lot, although his response time was abnormally slow and he parked his vehicle on the sidewalk. Upon approaching the Appellant, Severs testified that the Appellant had slurred speech, red eyes, and fumbled with his driver's license. Moreover, he noticed an odor of alcohol. Based upon these facts, Severs asked the Appellant to perform field sobriety tests which were conducted on a "reasonably level spot." The Appellant performed poorly on both the "walk and turn" test and the "one-leg stand" test. After the Appellant was arrested, four empty bottles of beer were found in his car, and, at the station, he refused a breathalyzer test and acknowledged drinking four beers. Moreover, at trial, the Appellant admitted that he had consumed alcohol earlier in the evening at a restaurant. Clearly, this evidence is sufficient to support the conviction.

Additionally, though not challenged with regard to the sufficiency, we note that the record also establishes DUI, third offense. The State introduced copies of two judgments of convictions for prior DUI convictions. Thus, enhancement to DUI, third offense, was appropriate.

II. Motion to Suppress

Next, the Appellant contends that the trial court erred in denying his motion to suppress "any and all evidence seized as a result of the warrantless and illegal arrest of the [Appellant]." Specifically, he argues that the stop was unlawful because no reasonable suspicion existed to stop the Appellant's vehicle because "Severs testified that he observed [the] Appellant weaving within his lane of traffic, which was the sole basis for reasonable suspicion[,]" which is insufficient to support reasonable suspicion.

The trial court's factual findings on a motion to suppress are conclusive on appeal unless the evidence preponderates against them. *State v. Binette,* 33 S.W.3d 215, 217 (Tenn. 2000). It is the appealing party who bears the burden of demonstrating that the evidence preponderates against the trial court's findings. *State v. Harts*, 7 S.W.3d 78, 84 (Tenn. Crim. App. 1999). Questions of credibility, the weight and value of the evidence, and the resolution of conflicting evidence are matters entrusted to the trial judge, and the court must uphold a trial court's findings of fact unless the evidence in the record preponderates against them. *Id.* (citing *State v. Odom,* 928 S.W.2d 18, 23 (Tenn. 1996)); *see also* Tenn. R. App. P. 13(d). However, application of the law to the facts is

a question that an appellate court reviews *de novo*. *State v. Keith,* 978 S.W.2d 861, 864 (Tenn. 1998). Both proof presented at the suppression hearing and proof presented at trial may be considered by an appellate court in deciding the propriety of the trial court's ruling on a motion to suppress. *State v. Henning,* 975 S.W.2d 290, 299 (Tenn. 1998); *State v. Perry,* 13 S.W.3d 724, 737 (Tenn. Crim. App. 1999).

The language of both the federal and state constitutions mandates that "a warrantless search or seizure is presumed unreasonable, and evidence discovered as a result thereof is subject to suppression unless the State demonstrates that the search or seizure was conducted pursuant to one of the narrowly defined exceptions to the warrant requirement." *State v. Yeargan,* 958 S.W.2d 626, 629 (Tenn. 1997) (citing *Coolidge v. New Hampshire,* 403 U.S. 443, 454-55, 91 S. Ct. 2022, 2032 (1971)); *see also State v. Garcia,* 123 S.W.3d 335, 343 (Tenn. 2003).

One such exception is a brief investigatory stop by a law enforcement officer if the officer has a reasonable suspicion, based upon specific and articulable facts, that a person has either committed a criminal offense or is about to commit a criminal offense. *Terry v. Ohio,* 392 U.S. 1, 21, 88 S. Ct. 1868, 1880 (1968); *Binette,* 33 S.W.3d at 218. This narrow exception has been extended to the investigatory stop of vehicles. *United States v. Brignoni-Ponce,* 422 U.S. 873, 881, 95 S. Ct. 2574, 2580 (1975); *State v. Watkins,* 827 S.W.2d 293, 294 (Tenn. 1992). In evaluating whether a police officer has a reasonable suspicion, supported by specific and articulable facts, a court must consider the totality of the circumstances. *Binette,* 33 S.W.3d at 218. Those circumstances may include the personal observations of the police officer, information obtained from other officers and agencies, information obtained from citizens, and the pattern of operation of certain offenders. *Watkins,* 827 S.W.2d at 294. Additionally, the reviewing court must consider any rational inferences and deductions that a trained officer may draw from those circumstances. *Id.* Objective standards apply rather than the subjective beliefs of the officers making the stop. *State v. Norwood,* 938 S.W.2d 23, 25 (Tenn. Crim. App. 1996).

To support his argument, the Appellant relies upon our supreme court's decisions in *Binette* and *Garcia*, which held that swerving within one's own lane of travel was insufficient to establish reasonable suspicion to stop a vehicle. While we agree with the Appellant's interpretation of the case law, it is not controlling upon the facts of this case. From the order denying the motion, it is clear that the trial court accredited the testimony of Severs and specifically found:

> In the present case, the arresting officer observed the [Appellant] weave inside his lane of traffic and cross the center line on three separate occasions. In addition, the officer described the [Appellant's] driving as erratic.
>
> Based on the totality of the circumstances, the police officer in this case had reasonable suspicion to make an investigatory stop of the [Appellant's] vehicle.

Clearly, in this case, as found by the trial court, Severs did not rely solely upon his observation that the Appellant was swerving within his own lane. Rather, Severs was clear in his testimony that prior

to initiating the traffic stop in question that he witnessed the Appellant weave within his own lane, drive erratically, and cross the center line of traffic on at least three occasions. Severs specifically testified at the hearing that on one occasion the Appellant crossed so far over the center line of traffic that there could have been an accident had there been a vehicle in the other lane. These observations were sufficient to establish reasonable suspicion. *See State v. Jesse Carl Page*, *Sr.*, No. M2007-00485-CCA-R3-CD (Tenn. Crim. App. at Nashville, Feb. 13, 2008); *State v. Harold Russell Gregory*, No. M2002-01461-CCA-R3-CD (Tenn. Crim. App. at Nashville, July 29, 2003). Thus, there was no error in denying the motion to suppress.

III. Motion to Strike Prior Conviction from Count 2

Next, the Appellant contends that the trial court erred in refusing to strike a prior conviction used to enhance his offense to that of DUI, third offense. Count 2 of the indictment initially provided notice of three prior convictions for DUI, specifically:

> 1. That on the 26th day of June, 2002, in Anderson County, Tennessee, the said JODY GLEN LOY, ALIAS, was convicted of the offense of DUI,
>
> 2. That in Case No. 8474N, on the 4th day of November 1994, in the General Sessions Court for Knox County, Tennessee, the said JODY GLEN LOY, ALIAS, was convicted of the offense of DUI,
>
> 3. That in Case No. 64823R, on the 30th day of June, 1994, in the General Sessions Court for Knox County, Tennessee, the said JODY GLEN LOY, was convicted of the offense of DUI[.]

On October 6, 2005, the Appellant filed a motion to strike two of the prior convictions on grounds that they were facially void because: (1) the Anderson County DUI arrest warrant section was blank, which deprived the court of personal jurisdiction over the Appellant; and (2) the Knox County conviction 64823R failed to recite the offense for which the Appellant was convicted. Following a hearing, the trial court denied the Appellant's motion, finding that the Appellant had waived any challenge to the defective warrants by pleading guilty in the Anderson County case and that the defects in both cases were not sufficient to void the convictions.

On April 28, 2006, the Appellant filed a motion to reconsider the denial of the motion to strike or exclude prior convictions following the filing of this court's decision in *State v. Ricky Lynn Norwood*, No. E2005-00704-CCA-R10-CD (Tenn. Crim. App. at Knoxville, Mar. 16, 2006). In *Norwood*, it was held that a prior DUI conviction could not be used to *enhance* punishment because the warrant was defective, in that the defendant had not signed the waiver of rights form, even though the conviction itself was not void. A hearing was held immediately prior to trial on May 10, 2006, at which the Appellant again asserted that the two convictions should be excluded for enhancement purposes. The court granted the Appellant's motion with regard to the Anderson County conviction, leaving the State with only two prior DUI offenses which could be used for

enhancement purposes. On appeal, the Appellant asserts that the Knox County conviction, No. 64823R, should also have been excluded, pursuant to *Norwood*, because it is facially void as it fails to recite the offense for which the Appellant was convicted. The State argues on appeal, as the trial court found, that the arrest warrant and judgment document is not facially invalid because the document, when read in its entirety, properly indicates that the Appellant was convicted of DUI.

The Tennessee Supreme Court has held that a facially invalid judgment cannot be used to enhance punishment in a subsequent prosecution. *State v. McClintock*, 732 S.W.2d 268, 272-73 (Tenn. 1987). However, "unless invalid on its face, a prior judgment of conviction in a court with personal and subject matter jurisdiction cannot be collaterally attacked in a subsequent proceeding in which the challenged conviction is used to enhance punishment." *Id*. at 272. Thus, we must determine if the judgment in this case is facially invalid.

The Tennessee Rules of Criminal Procedure, which are made applicable to general sessions court proceedings pursuant to Tenn. R. Crim. P.1, contain certain provisions regarding judgments. Rule 32(e) provides, in pertinent part, as follows:

> A judgment of conviction shall set forth the plea, the verdict or findings, and the adjudication and sentence. . . .

In addition, Rule 36 states,

> Clerical mistakes in judgments, orders, or other parts of the record and errors in the record arising from oversight or omission may be corrected by the court at any time and after such notice, if any, as the court orders.

The Appellant relies upon *Swanner v. State*, 215 S.W.2d 784 (Tenn. 1948), to support his argument that a judgment which fails to specify a conviction offense is facially invalid. In *Swanner*, our supreme court reversed a conviction in which the judgment form reflected that the defendant was found guilty and fixed a punishment, but failed to specify the charge for which the defendant had been convicted. *Swanner*, 215 S.W.2d at 785.

Swanner is, however, distinguishable from the instant case. The judgment forms utilized in the Knox County General Sessions Court contain not only the judgment of conviction section, but also a charging instrument section, as well as a waiver and plea agreement section. The Appellant is correct that the judgment form portion of the document is blank with regard to what offense the Appellant was convicted of. However, as noted by the State, the plea agreement portion of the document states, "I plead guilty to the charge in this warrant." In the warrant section of the form, it is stated that the Appellant was charged with DUI. We would also note that the judgment section of the form does indicate that the Appellant was sentenced to the statutory sentence for DUI, with loss of driving privileges for one year, and that the Appellant was required to attend DUI school. Because we conclude that the judgment of conviction for DUI is facially valid, the trial court did not err in refusing to exclude this conviction.

IV. Amendment of Indictment

Finally, the Appellant argues that the trial court erred in allowing the State to amend Count 2 of the indictment over the Appellant's objection after jeopardy had attached. Specifically, he asserts that "[a]fter the jury retired to consider the multi-offense count of the indictments, the State sought to amend the indictment to strike the Anderson County offense, . . . thereby reducing the offense charged from a felony to a misdemeanor. In addition, . . . [t]he State moved to amend the indictment to reverse the conviction dates on [the] two offenses, so that Case No. 8474N would have a 1998 date and Case No. 64823R would have a 1994 offense date."

Following the Appellant's conviction for DUI, the prosecutor read the jury the language of Count 2 of the indictment, as amended, which listed the Appellant's two prior DUI convictions upon which enhanced punishment was sought. No reference was made by the prosecutor to the Anderson County DUI conviction which had been stricken. The jury then retired to deliberate their verdict with regard to enhanced punishment.

At this point, the State apparently realized that, although the notice language of Count 2 provided that the conviction in case no. 8474N occurred "on the 4 day of November 1994," the correct conviction date was actually November 4, 1998. In this regard, the record reflects that on December 2, 2005, the State gave the Appellant notice of its intent to amend the indictment to reflect that the conviction in case no. 8474N occurred in 1998, not 1994. Apparently, in an attempt to amend the date, the conviction dates were transposed.[1] Accordingly, the State moved to amend the language in Count 2 to reverse the conviction dates for the two prior DUI convictions so that case no. 8474N would have a 1998 date and case no. 64823R would have a 1994 date. Although having been properly advised by the State of the correct dates of the convictions well in advance of trial, the Appellant objected to the State's motion to amend. Additionally, the Appellant argues that the State, upon reading the language of Count 2 to the jury, amended the indictment by intentionally deleting the word "feloniously," as contained in the indictment.

The following colloquy at the jury-out hearing transpired:

> [DEFENSE COUNSEL]: - - we would object to the amending of the indictment as it was done here . . . . It did state a different offense from a felony to a misdemeanor offense. We find that that should have been resubmitted to the Grand Jury for them to vote on that. We would object to that amendment and also to the amendment of the dates.

[1] The document which was read to the jury by the prosecutor, which purported to be Count 2 of the indictment, as amended, is not included in the record. Therefore, the issue of transposition of the dates of the offenses, while not contested, is not supported by the record. We would also note that Count 2 of the indictment, as returned by the jury, does not reflect any amendment to the face of the indictment.

> THE COURT: . . . [W]ith respect to the word "feloniously", that was never was never read to the jury; is that correct?
>
> And so you object to going from a felony to misdemeanor? Is that what you're saying?
>
> [DEFENSE COUNSEL]: We object to the amending of the indictment without the consent of the [Appellant].
>
> THE COURT: Oh. Wait a minute now, Mr. Reagan. You received the benefit of your Motion to Suppress. That amended the indictment prior to jeopardy attaching. And amending the indictment so that the jury didn't think [the Appellant] was charged with a felony probably inured to your benefit. . . .

After overruling the Appellant's objections, the trial court instructed the jury that the dates of the prior convictions had been transposed and informed the jury of the correct dates for each of the two prior DUI convictions.

As authority for the errors, the Appellant argues that the amendments "were improper under Rule 7(b) of the Tennessee Rules of Criminal Procedure." He further asserts:

> Because jeopardy attached in this case prior to the State's motion, the trial court should have denied the State's motion to amend. Appellant has been prejudiced because the amendment resulted in the charged offense becoming a misdemeanor. He did not receive adequate notice of the offense charged, and therefore did not have the ability to defend against the charge.

The Appellant's argument that this issue is governed by the amendment provisions of Tenn. R. Crim. P. 7 is misplaced. The provisions of Tennessee Code Annotated section 55-10-403(a) expressly provide that sentencing for repeat DUI offenders "shall constitute an enhanced sentence, not a new offense." Tenn. R. Crim. P. 7(b) has application to the amendment of criminal offenses following the return of an indictment, presentment, or information. The Appellant's argument that the amendment resulted in a "different offense" is ill-founded, as Count 2 does not charge "a new offense." *See State v. Harold M. Bayuk*, No. M2000-01654-CCA-R3-CD (Tenn. Crim. App. at Nashville, Mar. 8, 2001) (Tennessee Code Annotated section 55-10-403 constitutes enhanced punishment and is not a new or separate offense).

Tennessee Code Annotated section 55-10-402(g)(2) provides:

> In the prosecution of second or subsequent offenders, the indictment or charging instrument must allege the prior conviction or convictions for violating any of the provisions of §§ 55-10-401, 39-13-213(a)(2), 39-13-106, § 39-13-218 or § 55-10-418, setting forth the time and place of each prior conviction or convictions. . . .

The record demonstrates that the Appellant, well before trial, was aware of the correct time, place, and docket number of each DUI conviction used to enhance the Appellant's sentence to DUI, third offense. The Appellant's argument that "[h]e did not receive adequate notice of the offense charged, and therefore did not have the ability to defend against the charge" is altogether unclear. The Appellant clearly had notice under Count 1 of the indictment for the charged offense of driving under the influence. The Appellant's assertion that he was without notice of the two prior convictions is belied by the fact that two of the three original convictions relied upon for enhancement purposes were challenged by the Appellant and were the subject of an evidentiary hearing in which the Appellant sought to have the convictions stricken. References are found in the Appellant's motion and in the State's responsive pleadings with regard to all three convictions with regard to the correct time and place of conviction as required by statute.

CONCLUSION

Based upon the foregoing, the Appellant's judgment of conviction is affirmed.

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DAVID G. HAYES, JUDGE